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Supreme Court, U.S.
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No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

MOTION FOR LEAVE

TO PROCEED IN FORMA PAUPERIS

The Respondent, Hernan Ramirez, requests leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(6). The Respondent was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of May, 1997.

Michael R. Levine
Attorney for Petitioner

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the two reviewing courts that found the officers' predawn forced intrusion into a sleeping family's residence unreasonable under 18 U.S.C. Section 3109 correctly determined that, under the totality of the circumstances, more specific evidence of danger is required where the officers entered by damaging the homeowner's property than if they did not.

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I. STATEMENT OF THE CASE

A. Stipulated Facts.

The government's statement of the case omits the following important facts to which the parties stipulated in the District Court. (Pet. App. D, 42a-47a):

1. When Mr. and Mrs. Ramirez heard the breaking of glass, they thought they were being burglarized, and "they feared for their safety and that of their child who had awakened and was crying." (Pet. App. D, 45a).

2. After hearing the shattering of the garage window, Mr. Ramirez ran to a closet, obtained a pistol, and ran to the entrance of the garage where,"in a state of panic," he fired toward the ceiling "in an effort to scare away the intruders." A fragment of metal struck one of the officers in the face causing a slight wound. *Id.*

3. The law enforcement officers returned fire and simultaneously shouted "police, police." "Realizing, for the first time," that the intruders were police, Mr. Ramirez ran to the living room, threw away the firearm across the floor, and threw himself down on the floor in a prone position, "shaking from fright." *Id.*

4. Mr. Ramirez stated that "had he known that the police were trying to enter his home, he never would have fired the weapon." (Pet. App. D, 46a). Ultimately, Mr. Ramirez and his wife, who was carrying their three-year-old child in her arms, walked out of the house into police custody. *Id.*

5. "Despite a thorough search of the property, the officers did not find Shelby on the premises." (Pet. App. D, 46a).

6. During a post-arrest interview, Mr. and Mrs. Ramirez said they had not heard any announcement by the police because they were asleep. They were awakened by the shattering of glass and by other noises. *Id.* Mrs. Ramirez told officers that she did not know that the police were trying to enter her home and that "she believed that she was being burglarized and/or attacked by intruders." *Id.*

7. After one of the officers broke the garage window, he thrust his firearm through the window and waved it about "ready to shoot if necessary, but he had trouble with this maneuver when the window's curtain got in his way." (Pet. App. D, 44a).

The government's statement also contains the following errors:

1. Shelby escaped from custody on November 1, 1994 (*see* Affidavit of Deputy Marshal Kauffman, Pet. 37a ¶ 2), not on November 2. (Pet. 3).

2. Contrary to the government's statement, Mr. Ramirez did not tell the agents after his arrest that a man resembling Shelby "had been" at his house two days earlier (Pet. 5); he told them only that such a person "might have been" on his property two days earlier (Pet. App. D, 46a).

Except for the above-mentioned errors and omissions, Mr. Ramirez accepts the government's statement of facts.

B. The Decision Of The District Court.

The District Court rejected Mr. Ramirez's argument that the warrant was not based on probable cause, but granted his motion to suppress the firearms because the officers violated 18 U.S.C. § 3109 and the Fourth Amendment. The court relied on the Ninth Circuit's long-standing test for exigent circumstances restated in *United States v. Becker*, 23 F.3d 1537, 1540-41 (9th Cir.

1994). Following *Becker*'s reasoning, the District Court acknowledged that "mild exigency," such as knowledge that a person is dangerous, can justify immediate entry into a residence that is done without destruction of property. (Pet. 32a). To justify destruction of property, however, "more specific inferences of exigency are necessary." *Id.*

Applying the approach in *Becker*, the District Court found that although there were specific facts regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as means of intimidation, "there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there." (Pet. 34a). The District Court concluded that there were

> insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him the early morning of 5 November as to justify abandoning the "simple and ancient requirement that the officers ought to signify the cause of their coming, and to make request to open doors" before destroying property during a governmental intrusion into a person's home.

(Pet. 34a, citations omitted).

C. The Decision Of The Court Of Appeals.

The Court of Appeals affirmed the District Court in a 2-1 opinion. The majority began its analysis by observing that "nowhere is the protective force of the fourth amendment more powerful than when the sanctity of the home is involved." (Pet. 5a, citations omitted). Citing *Becker*, the Court observed that the Fourth Amendment helps protect "our homes--the centers of our family life and our refuge from the rude world." (Pet. 5a). The Court explained further that the Amendment protects the "privacy, the safety, and the property" of our citizens. (Pet. 6a).

Turning to the knock-and-announce principle, the Court noted that in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), this Court concluded that the principle "was woven quickly into the fabric of early American law" and that, as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered in assessing the reasonableness of a search and seizure. (Pet. 6a-7a, quoting *Wilson*, 115 S. Ct. at 1917-18).

The appellate court then observed that the common law tradition finds expression in the federal knock-and-announce statute, 18 U.S.C. § 3109, which allows an officer to break open a door or window of a house to execute a warrant "if, after notice of his authority and purpose," he is refused admittance. "We insist upon this notice," said the Court of Appeals, "because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well." (Pet. 7a). The Court reiterated that "the fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families...." *Id.* (quoting *Becker*, 23 F.3d at 1540).

Citing this Court's admonition in *Sabbath v. United States*, 391 U.S. 585, 589 (1968), the Court of Appeals explained that "we also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle." (Pet. 7a). Such a mistaken belief occurred here, said the Court, a mistake that almost ended in tragedy:

> Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

(Pet. 8a). The Court of Appeals said this near-tragedy occurred because, when the officers executed the warrant, "they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen." *Id.* Elaborating, the Court asked rhetorically, "what could they have expected when they broke into the home of a sleeping family in the early hours of the morning?" (Pet. 14a). Ramirez "fired a gun at the ceiling of his own home when unknown intruders were invading it." (Pet. 16a).

The Court of Appeals readily agreed that exigent circumstances could justify breaking into a house without notice, but noted that "mere incantation of that phrase" was not sufficient. It was the Court's responsibility to determine "what kind of exigency it was." (Pet. 8a). The Court noted that in the case at bar, "an officer broke into the home through a window and was ready to fire the weapon if he deemed it necessary to do so." Citing *Becker,* the Court said that more than a mild exigency was needed and that to justify physical destruction of property "more specific inferences of exigency are necessary." (Pet. 8a, quoting *Becker*, 23 F.3d at 1541).

In determining the kind of exigency that existed, the Court of Appeals reasoned that the forty-five armed officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout "where they might be met by a fusillade of gunfire." (Pet. 8a). They were concerned about one person, Shelby, who "might" be on the premises, but Shelby was "not known to have ever shot or shot at anyone." *Id.* The Court explained that "there [was] no suggestion that the police presence was known, no confirmation that Shelby was on the premises and, more importantly, no indication that Shelby was armed and would resist with deadly force." (Pet. 10a-11a). The Court reiterated that the officers "did not know that Shelby had a gun, nor that he had access to one, nor that he would consider using one against them." (Pet. 11a).

After a thorough review of the Circuit's cases, the Court of Appeals concluded by observing that its review was "necessarily fact bound." (Pet. 11a). Acknowledging that police "must have some leeway in balancing the demand of the knock-and-announce requirement against other safety considerations," the Court said that it was the Court's duty to determine "whether the police struck that balance properly." The Court concluded by holding that the officers' entry violated both Section 3109 and the Fourth Amendment. (Pet.17a).

The dissenting judge disagreed with the majority's result and claimed it was inconsistent with other cases in the Circuit. However, he never attacked the soundness of the approach set forth in *Becker;* nor did he assert that the approach conflicted with that employed in any other Circuit.

II. REASONS FOR DENYING CERTIORARI

A. Certiorari Should Be Denied And The Court Should Decline To Hear The Government's Challenge To The Ninth Circuit's Approach Because The Government Embraced This Approach In The District Court And Attacked It Only After Losing In The Court of Appeals.

The government challenges the test used by the Ninth Circuit to determine whether exigent circumstances justify an officer's failure to comply with the knock-and-announce requirements set forth in 18 U.S.C. § 3109 and embodied in the Fourth Amendment. For each of the three reasons set forth below, the government has waived this challenge.

1. The Government's Embrace of the Test in the District Court Constitutes a Waiver.

In the District Court, the government did not challenge the Ninth Circuit's approach about which it now complains. On the contrary, the government relied upon the approach to support its view that exigent circumstances justified dispensing with the knock-and-announce requirement.

(Gov. Mem., Lodged Doc. A).[1] Indeed, in oral argument before the District Court, the government praised *Becker,* which had recently applied the test, as "*very useful for the court . . . in stating the standard which in this case must be specific inferences of exigency.*" (Tr. Oral Arg. 4/25/95 at 21, Lodged Doc. B, emphasis added). The government's embrace in the District Court of the very test it now challenges here constitutes a forfeiture or waiver of the argument. *See e.g., Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring) ("a party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (where government said below it was satisfied with the governing case, the Court "decline[s] to consider this issue, which was raised for the first time in the petition for certiorari").

2. **The Government's Failure to Attack the Test in the Court of Appeals Until a Petition for Rehearing Constitutes a Waiver.**

Similarly, in the Court of Appeals, the government never questioned the appropriateness of the Circuit's long-standing test, but argued only that the District Court had misapplied it. (Gov. Briefs, Lodged Docs. C & D). Only after the Ninth Circuit affirmed the District Court, did the government attack the test for the first time in its petition for rehearing and suggestion for rehearing *en banc*. (Pet. Reh'g, Lodged Doc. E).

Playing the game by the rules, losing the game, then complaining about the rules is classic sandbagging. *Cf. Freytag,* 501 U.S. at 895 (Scalia, J., concurring) ("sandbagging" is the practice of "suggesting or permitting, for strategic reasons, the trial court to pursue a certain course, and later–if the outcome is unfavorable–claiming that the course followed was reversible error"). By

[1]Mr. Ramirez has lodged documents A-G with the Clerk of Court.

waiting until a petition for rehearing to challenge the Ninth Circuit's approach that it embraced both in the District Court and in the Court of Appeals, the government clearly waived the argument in the Court of Appeals. *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir.), *cert. denied*, 506 U.S. 904 (1992); *see United States v. Quiroz*, 22 F.3d 489, 490-91 (2nd Cir. 1994) (same).

For the same reason, the government has waived the argument in this Court because the Court ordinarily "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234(1976); *see United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (respondent's Fourth Amendment claim waived when not raised below and where no exceptional circumstances); *Steagald v. United States*, 451 U.S. 204, 209-10 (1981) (government loses right to contest standing when it failed to raise issue in the lower court). Waiver or forfeiture is particularly appropriate here where the government's conduct is tantamount to invited error. *Cf. United States v. Wells*, 117 S.Ct. 921, 925 (1997) (under the "invited error" doctrine a party may not complain of errors that he himself invited or provoked in the District Court unless "pressed in or passed on" by the Court of Appeals).

3. **The Government's Failure to Present Its Primary Argument At Any Time In the Court of Appeals Constitutes a Waiver.**

In this Court, the government argues for the first time that the Ninth Circuit's test erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry (Pet. 9), and that the need to damage property in making an unannounced entry "has no bearing on whether...law enforcement interests are present." (Pet.12). The government never raised this argument in the Court of

Appeals even in its petition for rehearing where it argued only that the District Court erred in according "dispositive significance" to property damage. (Lodged Doc. E at 12). The proper test, the government argued below, should consider property damage but only "as a single factor in the 'reasonableness' balancing test required by the Supreme Court's decision" in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995). (Doc. E at 12-13).

The government's failure to present to the Ninth Circuit the argument it raises here constitutes a waiver. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (argument waived because "respondent's present defense of the judgment, however, is not one he advanced below"); *Alvarez-Sanchez*, 511 U.S. at 360 n.5; *Steagald*, 451 U.S. at 209-210.

In sum, it is often the government which is quick to argue that petitioners have waived or forfeited issues and arguments by not raising them below. *See e.g.*, Gov. Brief in *United States v. Olano*, 507 U.S. 725 (1993), at 1992 WL 511970. The government having waived its argument here, the Court should deny the government's petition.

B. Certiorari Should Be Denied Because The Decision Below Follows Longstanding Precedent And Does Not Create An Intercircuit Conflict.

Conceding that the Ninth Circuit's approach has been a "long standing rule" in the Circuit (Pet. 11), the government nevertheless claims that the approach conflicts with that employed in the other Circuits. (Pet. 10). The government's argument is wrong; there is no conflict. The government fails to cite a single case that has ever even questioned the Ninth Circuit's approach, much less rejected it.

The Ninth Circuit's approach was apparently first enunciated twenty-four years ago in *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 416 U.S. 970

(1974). The approach was reaffirmed by the Court *en banc* in *United States v. McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 416 U.S. 970 (1984). *McConney* defines exigent circumstances as:

> those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

McConney, 728 F.2d at 1195.

In distinguishing between the kinds of exigency, the Court states as follows:

> mild exigency is sufficient to justify simultaneous entry when entry can be accomplished without physical destruction of property. *United States v. Bustamente-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973). Mild exigency may exist where there is a likelihood that the occupants will try to escape, resist, or destroy evidence. More specific inferences of exigency are necessary if entry may be obtained only by the physical destruction of property.

Id., 728 F.2d at 1206 (some citations omitted).

Cases in many Circuits cite various propositions in *Bustamante-Gamez* and *McConney* with approval, and none question the reasoning of either case.[2] Tellingly, the dissenting judge below, in his lengthy and vigorous opinion, nowhere asserts that the approach taken by the majority conflicts with that employed in any other Circuit. In fact, he cites *Bustamante-Gamez* himself for the proposition that the knock-and-announce requirement is not inflexible. (Pet. 24a).

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[2]*See United States v. Brown*, 52 F.3d 415 (2d Cir. 1995) (citing *Bustamante-Gamez* for the purposes underlying the knock-and-announce rule including prevention of "needless destruction of property"), *cert. denied*, 116 S.Ct. at 754 (1996); *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994) (same); *United States v. Kane*, 637 F.2d 974 (3rd Cir. 1991) (citing case for propositions that Section 3109 "reduces the potential for violence to both the police officers and the occupants of the house" and prevents damage to private property that may be needlessly destroyed in a forced entry).

Furthermore the approach of the Ninth Circuit is fully consistent with this Court's precedents interpreting 18 U.S.C. § 3109. *See Miller v. United States*, 357 U.S. 301, 306-07 (1958) (knock-and-announce requirements contained in Section 3109 are "deeply rooted in our heritage and should not be given a grudging application"); *Sabbath v. United States*, 391 U.S. at 589 (same).

The government asserts that "[i]n no other circuit" does it face an increased burden to justify a no-knock entry "simply because property damage occurred in the course of the entry." (Pet. 10). This is incorrect. It is true that other Circuits do not use the precise "mild exigency" language that the Ninth Circuit employs. The government cites no case, however, suggesting that in determining the objective reasonableness of the officers' decision to make an unannounced entry, the reviewing court may not require more specific evidence of exigency to justify damage to property. Indeed, the cases that have discussed the issue suggest the contrary. *See United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) ("the conclusion of exigency under these facts must be *especially clear ...where the destruction of physical property took place"); United States v. Brown*, 52 F.3d 415, 421 (2d Cir. 1995) (one of the "touchstones for determining the existence of exigent circumstances...[is] the peaceful circumstances of the entry"), *cert. denied*, 116 S. Ct. at 754 (1996); *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (reasonableness of warrantless, unannounced entry into home to look for fugitive, depends partly on whether entry made "peaceably"); *King v. Marmon*, 793 F. Supp. 1030, 1033 (D. Kansas 1992) ("courts have found that only a mild indication of exigency is required...if no physical damage to the premises is necessary to enter, although more specific inferences of exigency are necessary when physical disruption of property is required").

Several state cases apply the same test. In *State v. Ogden*, 161 Vt. 336, 640 A.2d 6 (1993), the court affirmed a no-knock entry primarily on the ground that there was no destruction of property. The court said "where the police have knocked and announced their identity and purpose, an exigency may justify immediate entry if that entry can be accomplished without physical destruction of property." 161 Vt. at 340, 640 A.2d at 9-10 (citing *McConney*, 728 F.2d at 1206); *see Trosper v. State of Alaska*, 721 P.2d 134, 135 (1986) (citing *Bustamante-Gamez*, court holds that where there was no destruction of property only a "mild" exigency was required to excuse noncompliance with the knock-and-announce principle).

The cases the government cites in support of its argument that a conflict exists are fully consistent with the approach employed by the Ninth Circuit. Although these cases do not focus on property damage, such focus was unnecessary given the very strong showing of inferences of danger in virtually every case. *See United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (defendant seen night before with large amount of crack and two loaded guns, had criminal record and alias, and residence had steel doors), *cert. denied*, 1997 WL 27218 (April 14, 1997); *United States v. Dahlman*, 13 F.3d 1391, 1394 n.3, 1398 (10th Cir. 1993) (defendant said he intended to "shoot it out" with police rather than be arrested, had reached for gun during earlier arrest, and was alerted to police presence by barking guard dog), *cert. denied*, 511 U.S. 1045 (1994); *United States v. Kennedy*, 32 F.3d 876, 882-83 (4th Cir. 1994) (defendant was narcotics trafficker in midst of deal with others with prior firearms convictions who were probably armed and had told friend that if he was arrested it would be for "killing a cop"), *cert. denied*, 115 S. Ct. 939 (1995); *United States v. Lalor*, 996 F.2d 1578 (4th Cir.) (defendant arrested with a firearm and drugs six

days earlier, had been "belligerent" and had made "derogatory remarks" about the police, and was cocaine dealer), *cert. denied*, 510 U.S. 983 (1993).

The government's insistence that in the other Circuits damage to property is irrelevant to the question of the reasonableness of a failure to comply with Section 3109 is puzzling in view of this Court's statement in *Wilson* that as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered in assessing the reasonableness of a search and seizure. 115 S. Ct. at 1917-18. It is also puzzling given the government's concession that "one of the interests that underlie the knock-and-announce principle is the avoidance of damage to property." (Pet. 10, citing *Wilson*,115 S. Ct. at 1918-19); *see Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 n.5 (1997) (interest in avoiding property damage "not inconsequential"). In fact, the ancient common law rule was justified in part by the belief that announcement generally would avoid the "*destruction or breaking of any house...by which great damage and inconvenience might ensue.*" *Wilson*, 115 S. Ct. at 1917-1918 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 91b, 77 Eng.Rep. 194, 196 (K.B. 1603) (emphasis added).

In any event, every Circuit agrees that prevention of damage to property is one of the three fundamental interests safeguarded by Section 3109. The Sixth Circuit summarized the law as follows:

> As recognized by other Circuits addressing this issue, the interests protected by § 3109 include: (1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) *the needless destruction of private property*; and (3) a recognition of the individual's right to privacy in his [or her] house.

United States v. Bates, 84 F.3d 790, 794 (6th Cir. 1996) (emphasis added); *see Bonner v. Anderson*, 81 F.3d 472, 474 (4th Cir. 1996) (same); *United States v. Kemp*, 12 F.3d 1140, 1142

(D.C. Cir. 1994) (same); *United States v. Brown*, 52 F.3d 415, 421 (2d Cir.1995) (the three interests "are not debatable"), *cert. denied*, 116 S. Ct. 754 (1996); *United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986); *see generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a) at 599 (3d ed. 1996) ("preventing the physical destruction of property" is one of the three "most worthwhile" goals underlying the rule).

At most, the approach taken by the various Circuits differs from that taken by the Ninth Circuit only in language or in emphasis. There is clearly no conflict of the kind that warrants a grant of certiorari. *Cf. United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (where one Circuit's interpretation of a statute was "squarely inconsistent" with another's, certiorari was granted). Even if there were a conflict, the Court should not grant certiorari until the conflict is more fully developed by the Circuit Courts. This is particularly true now that the Court has reviewed two knock-and-announce cases within a short time: *Richards v. Wisconsin* and *Wilson v. Arkansas*. The Court should wait until the Circuits have worked out the various ramifications of these new cases. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issues require "further study" in lower courts "before it is addressed by this Court").

C. Certiorari Should Be Denied Because The Decision Below Is Not Sufficiently Important to Warrant Review.

As far as Mr. Ramirez is aware, until its petition for rehearing *en banc* in the instant case, the government never before challenged the Ninth Circuit's approach. On the contrary, for the

last twenty-four years, the government has constantly relied upon it to argue that no-knock entries should be upheld. Indeed, in those cases the government has almost always been successful.[3]

The government's past practice of embracing the approach it now attacks strongly suggests that the government is simply unhappy with the result reached below. It is well settled, however, that even if the decision below were incorrect, the Court does not grant certiorari merely to correct an erroneous result.[4] Therefore, the government's petition should be denied.

D. Certiorari Should Be Denied Because The Result Below Is Correct For Reasons Independent Of The Issue Raised In The Petition.

The judgment below may be defended "on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n. 6 (1982); *see Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997) (citing cases). In the instant case, there are three such grounds: (1) there was no probable cause to issue the warrant; (2) the warrant was

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[3]*See, e.g., United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996); *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996); *United States v. Perez*, 67 F.3d 1371 (9th Cir. 1995); *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir.1985); *United States v. Turner*, 926 F.2d 883 (9th Cir.), *cert denied*, 502 U.S. 830 (1991); *United States v. Arias*, 923 F.2d 1387, 1391 (9th Cir.), *cert. denied* (1991); *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert denied*, 416 U.S. 970 (1974); *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984); *United States v. Scott*, 520 F.2d 697, 700-01 (9th Cir. 1975); *United States v. McShane*, 462 F.2d 5 (9th Cir. 1972); *Gilbert v. United States*, 366 F.2d 923 (9th Cir. 1966).

[4]As Chief Justice Rehnquist has admonished, "we must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, C.J., dissenting); *see Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) (certiorari jurisdiction is "designed to serve purposes broader than the correction of error in particular cases").

void because the magistrate lacked jurisdiction to issue a "no-knock" warrant; and (3) Section 3109 contains no exception for danger to the officer.

1. <u>There Was No Probable Cause To Issue The Warrant</u>.

The result below is correct because, contrary to the conclusion of the District Court, there was no probable cause to believe that Shelby was spending nights in the Ramirez home at all, much less the nights of November 4 and 5. The Ninth Circuit said there "may well be some doubt" about this matter, but did not decide the issue; it assumed probable cause existed. (Pet. 12a n. 1).

The affidavit in support of the application for the warrant does not establish probable cause to believe that Shelby was sleeping at the residence. At most, the affidavit establishes that a man resembling Shelby had been seen during the day of November 2 or 3 working "outside the residence washing a car." (Pet. 40a ¶ 6). When Deputy U.S. Marshal Kauffman went to the property, he could only see someone whom he believed looked like Shelby. Even this tentative identification was questionable at best because it was made from a distance of "approximately 1000 yards" (Pet. 40a), well over one-half a mile. According to the Court of Appeals, "the most that was known" was that Shelby was on the property "two or three days earlier." (Pet. 12a n.1). The high probability was that Shelby, if he had been at the residence at all, was simply working there during the daytime for one or two days. After all, he was a fugitive, and of necessity on the run. This showing did not establish probable cause to believe Shelby was in the residence during the predawn hours of November 5.

Furthermore, before shattering a window and forcing entry into a family residence in predawn hours without the requisite announcement, the officers should have more than the bare

minimum of probable cause to believe the fugitive is in the residence; they should have a "strong reason" to believe that the suspect is there. *See Brown*, 52 F.3d at 415; *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970).

In sum, the Court below correctly affirmed the District Court's suppression of the evidence, and certiorari should be denied.[5]

2. The Warrant Was Void Ab Initio Because the Magistrate Had No Jurisdiction to Issue a "No-Knock" Warrant.

The result below is correct because the magistrate lacked authority to issue a "no-knock" warrant; therefore, the warrant was void *ab initio*. *Cf. Gomez v. United States*, 490 U.S. 858, 876 (1989) (where Congress did not authorize a magistrate to select a jury over objection, the conviction is void regardless of lack of prejudice); *Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996) (because magistrate may not "undertake the exercise of an authority which Congress has expressly withheld," contempt order vacated), *cert. denied*, 117 S. Ct. 1473 (1997).

In the District Court and in the Court of Appeals, the government argued that the officers' belief in the existence of exigent circumstances was reasonable in light of the magistrate's having issued a "no-knock" warrant. (Lodged Doc. A at 11; Doc. C at 13). This warrant authorized the officers to dispense with the knock-and-announce requirement when executing the warrant. (Lodged Doc. F). Not surprisingly, the government does not renew that argument here. The government no doubt realizes that it failed to advise the magistrate that he had no authority to

[5]The government cannot rely on the good faith exception to the warrant requirement recognized in *United States v. Leon*, 468 U.S. 897 (1984), because the government did not act in good faith in applying for a "no-knock" warrant, which the government knew was not authorized by law. *See* Part D2, *infra*.

issue a "no-knock" warrant. Neither Rule 41 of the Federal Rules of Criminal Procedure, which governs the issuance of search warrants, nor any other federal rule or statute authorizes such warrants. In fact, Congress repealed any authority for such warrants.

In 1970, Congress enacted legislation authorizing the issuance of "no-knock" warrants in drug cases when the magistrate found probable cause to believe that, if notice were given, the safety of the executing officer would be endangered or the destruction of evidence would occur. *See* Section 509(b) of the Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1236, 1274 (codified at 21 U.S.C. § 879(b) (1970) (repealed)). Barely four years later, however, Congress repealed the law. *See* Section 3 of Pub.L. 93-481, 88 Stat. 1455, 1455-56 (1974). According to one court, repeal was so quick because "Congress discovered" that no-knock warrants created a "staggering potential for violence to both occupants and police." *State v. Bamber*, 630 So.2d 1048, 1058 (Fla. 1994).

Indeed, during the four-year period when no-knock warrants were issued, "horror stories were legion." *Bamber*, 630 So.2d at 1051 (quoting Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum. L. Rev. 685 (1993)).

> Over 100 newspaper articles reproduced in the Congressional Record, described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers who had entered their home without notice. In an exhaustive eight-week investigation by The New York Times, consisting of interviews with victims of "no-knock" raids, reporters found that innocent Americans around the country have been subject to dozens of mistaken, violent and often illegal police raids by local, state and federal narcotics agents in search of illicit drugs and their dealers.

Bamber at 1051 (quoting *Garcia* at 705); *see* 120 Cong. Rec. 22,886-88 (1974) (N.Y. Times Article); 120 Cong. Rec. 26,874 (1974) (Wall St. J. Article); 119 Cong. Rec. 15,170-76 (1973) (numerous articles and letters to Senator Ervin); 119 Cong. Rec. 23, 242-58 (1973).

Prepatory to the passage of the repealing legislation, House and Senate Committees extensively documented the abuses brought about by four years of "no-knock" warrants. The House Committee noted, for example, "several instances in which Department of Justice enforcement agents in their eagerness to crush illicit drug trafficking have mistakenly broken into the homes and apartments of dozens of innocent families, terrorizing the occupants and heavily damaging property." H. Report 93-1248, at 6, 8. The Committee also determined that law enforcement agencies were showing "a lack of discretion and attention to alternative methods of securing evidence on the part of the Department of Justice." *Id.* at 8; 120 Cong. Rec. 26,781 (1974). In 1974, the Senate voted to repeal the no-knock statute by a 2 to1 margin. *Garcia*, *supra* at 703.

Thus, the empirical evidence showed that rather than reducing violence, no-knock warrants did the opposite: they "had in several instances resulted in serious injury and death of law enforcement officers and civilians." H. Report 93-1248 at 8; 120 Cong. Rec. 26,781 (1974). As concisely put by Senator Sam Ervin,

> I know of no provision of law which puts officers of the law in more jeopardy of life and limb than..."no-knock" searches of the homes of our citizens. *When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it is a burglar. He is going to resist to the utmost, even to the taking of lives....*It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true. He is more likely to lose his life if he attempts to break in without notice.

120 Cong. Rec. 22,884 (1974) (emphasis added); *see also* Remarks of Representative Tim Lee Carter, 120 Cong. Rec. 26,781 (1974) ("In the area which I come from, if a man knocks the door down and goes in [without notice], he usually comes out feet first and the undertaker takes care of him. A man's house is his castle").

Unfortunately, even today, noncompliance with the knock-and-announce rule continues to cause needless death and tragedy among both police officers and civilians alike. Lodged with the Court (Doc. G) are several newspaper articles describing needless tragedies that have occurred in recent years, four of which are summarized below.[6]

Without referring either to the federal experience with "no-knock" warrants, or to the contemporary accounts of tragedies, this Court recently suggested in *obiter dictum* that the practice of some state courts to issue such warrants was "entirely reasonable" under some

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[6](1) The shooting of Juan Rocha-Gallegos seven times during a no-knock drug raid. Rocha-Gallegos said he was awakened by the sound of the locks of his house being shot off, then jumped out of bed when six people burst through the door and shined flashlights on him. He was shot in the chest, arms, and legs. (Denver Post, April 3, 1996, 1996 WL 6689450); (2) the death of Accelyne Williams, a 75 year-old reverend, who died from a heart attack after a heavily armed team of 13 officers, using a no-knock warrant, mistakenly burst into his second-floor apartment, chased him to the bedroom, and wrestled him to the floor. The police later admitted that they had barged into the wrong apartment. (The Boston Globe, January 27, 1995, 1995 WL 5924468); (3) the near-fatal shooting of Donald L. Carlson, a Fortune 500 company executive, whose home was broken into by a heavily armed force of federal agents looking for drugs. Aroused from a deep sleep, Carlson wounded an officer as he fired in self-defense at persons he perceived to be criminal intruders; he was himself wounded three times. No drugs were found. (San Diego Union-Tribune, December 13, 1992, 1992 WL 4766590); (4) the death of multimillionaire Donald Scott during a no-knock raid on his Malibu ranch by police looking for drugs. None were found. Roused by his wife's cries, after the task force burst into his home, and partially blinded by a cataract operation, the 61-year-old Scott rushed into the living room holding a revolver above his head. The police said that instead of dropping the weapon as ordered, Scott lowered it in the officers' direction. Scott was shot twice in the chest and died. (San Francisco Chronicle, November 2, 1992, 1992 WL 6287829).

circumstances. *Richards*, 117 S. Ct. at 1422 n.7. Clearly, by repealing the federal no-knock law, Congress reached the opposite conclusion, and, at least with respect to Section 3109 and the federal courts, unequivocally rejected the reasonableness of no-knock warrants.

In sum, the warrant issued in the instant case was void, and by affirming the suppression of evidence, the court below reached the correct result. Therefore, certiorari should be denied. Certiorari should also be denied because, by requesting the magistrate to issue a "no-knock" warrant, the government asked the magistrate to perform an unlawful act, and the magistrate did so. The Court should not reward the government's conduct by granting the government's petition here.

3. Section 3109 Provides No Exception For Danger To The Officers Executing the Warrant.

The result below is correct because Section 3109 contains no exception for danger to the officers executing the warrant. In enacting the statute, Congress balanced the interests and determined that compliance with Section 3109 best safeguards the safety of both officers and civilians. As stated by one court, "Congress could reasonably have concluded that a directive such as Section 3109 would enhance the safety of law enforcement officials." *United States v. Nolan*, 718 F.2d 589, 596 n.10 (3rd Cir. 1983); *see United States v. Pratter*, 465 F.2d 227, 233 n.16 (7th Cir. 1972) ("strict compliance with the statute is a protection to the safety of the arresting officers and to the effective accomplishment of their mission.").

Mr. Ramirez acknowledges that the knock-and-announce requirement *embodied in the Fourth Amendment* can "give way under circumstances presenting a threat of physical violence."

Richards v. Wisconsin, 117 S. Ct. at 1420 (quoting *Wilson*, 514 U.S. at 936). This exception is in addition to three others that have been previously recognized:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., concurring and dissenting).

Importantly, while "danger to the officer" is an exception under the Fourth Amendment, this Court has never held it is also an exception under Section 3109. *See Sabbath*, 391 U.S. at 591 (not necessary to decide the issue because facts do not show officer at risk); *Miller v. United States*, 357 U.S. at 309 (court need not decide whether Section 3109 permits any exceptions for exigent circumstances because necessary facts not present).

Mr. Ramirez also acknowledges that the Circuits reaching the issue, including the Ninth, hold that compliance with the requirements of Section 3109 may be excused if the safety of the executing officer is at risk.[7] As shown below, however, none of these cases is correctly reasoned because none has undertaken the appropriate statutory and historical analysis.

a. The Criteria Of Section 3109 Are Not Coextensive With Those Of The Fourth Amendment.

Contrary to the government's assumption (Pet. 11 n.3), the statutory and Fourth Amendment criteria governing exceptions to the knock-and-announce requirements are not the

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[7] *See, e.g., Hudson*, 100 F.3d at 1417 (9th Cir. 1996); *United States v. Kane*, 637 F.2d 974, 978 (3rd Cir. 1981); *United Sates v. Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988); *Stewart*, 867 F.2d at 584.

same. Compliance with the Fourth Amendment standard is measured not by the specific requirements of Section 3109, but only by what is "reasonable." *See Wilson*, 115 S. Ct. at 1918 n.3 ("in *Miller*, our discussion focused on the statutory requirement of announcement found in 18 U.S.C. § 3109, not on the constitutional requirement of reasonableness"); *Ker v. California*, 374 U.S. 23, 38-41 (1963) (reasonableness standard of Fourth Amendment, rather than Section 3109, governs how state officers enter a suspect's home); *United States v. Baker*, 16 F.3d 854, 856 (8th Cir. 1994) (entry by state officers governed only by "reasonableness" standard of Fourth Amendment, not by statutory criteria of Section 3109).

Thus, the Fourth Amendment and statutory no-knock provisions "are not coextensive." *United States v. Stiver*, 9 F.3d 298, 301 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1115 (1994). Some conduct authorized by Section 3109 may nonetheless violate the Constitution; conversely, "some conduct permissible under the Constitution may be barred by Section 3109." *Stiver*, 9 F.3d at 302; *see United States v. Sagaribay*, 982 F.2d 906, 910 (5th Cir.) (although search violated Section 3109, it was still reasonable under the Fourth Amendment), *cert. denied*, 114 S. Ct. 160 (1993).

b. <u>The Plain Words of Section 3109 Contain No Exception for Officer Safety</u>.

In Section 3109, Congress provided that in executing a search warrant at a residence, an officer may force entry by breaking open a door or window in only three limited circumstances: (1) if, after notice of his authority and purpose, he is refused admittance, (2) when necessary to liberate himself, or (3) when necessary to liberate a person aiding him in the execution of the warrant. Conspicuously absent is any exception for officer safety. From this absence, it is reasonable to infer that Congress intended no such exception.

Traditional rules of statutory construction support this view. In interpreting a statute, the Court looks first to the plain meaning of the words used by Congress. As the Court has explained:

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citations and quotations omitted); *accord United States v. James*, 478 U.S. 597, 604 (1986). The language of Section 3109 is quite clear. The enumerated exceptions do not include an exception for apprehension of danger to the officers. Had Congress intended to create such an exception, it would have said so. *See United States v. Sims*, 231 F. Supp. 251, 257-58 (D. Md. 1964) (risk of danger to officer if he complies with Section 3109 does not excuse officers' breaking into hotel room by use of pass key because Section 3109 contains no such exception). Under such circumstances the rule of "*exclusio alterius*" applies.[8]

Furthermore, Congress is "presumed to know the law." *Imar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2336 (1995) (Stevens, J., dissenting). By 1917, when

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[8] *See Becker v. United States*, 451 U.S. 1306, 1309 (1981) (On Application for Stay, Rehnquist, J.,) ("[t]he language of Rule 62(d) seems clear, and the enumerated exceptions do not include tax summons enforcement proceedings. *Expressio unius est exclusio alterius*"); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) ("In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the *maxim expressio unius est exclusio alterius*, we must presume that these were the only "hardship cases" Congress intended to exempt").

Section 3109 was enacted, courts had recognized an exception for officer safety.[9] Congress nevertheless did not mention this exception in Section 3109 although Congress expressly included other exceptions. This omission provides further support for the conclusion that Congress intended no exception for officer safety.

In addition, Congress' repeal of the federal no-knock legislation only four years after its enactment, as described at pages 17-20 above, reinforces the conclusion that Congress did not intend an exception for apprehension of danger to exist. In repealing this legislation, Congress implicitly declared that compliance with the requirements of Section 3109 best assures the safety of the officers and civilians alike.

c. If Section 3109 Incorporates the Common Law at the Time of the Framing, it Follows That the Section Contains No Exception for Apprehension of Danger Because the Common Law Contained No Such Exception.

The Court has suggested that Section 3109 incorporates the common law's knock-and-announce principle as well as its common law exceptions at the time of the framing of the Fourth Amendment. *See Wilson*, 115 S. Ct. at 1918 n.3; *Sabbath*, 391 U.S. at 591 n.8 ("exceptions to any possible constitutional rule relating to announcement and entry have been recognized . . . and there is little reason why those limited exceptions might not also apply to Section 3109, since they existed at common law, of which the statute is a codification").

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[9] *See Read v. Case*, 4 Conn. 166, 170 (1822)(plaintiff who "had resolved...to resist even to the shedding of blood...was not within the reason and spirit of the rule requiring notice."); *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng.Rep. 293, 296 (P.C. 1843) ("[w]hile he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them?").

If so, the conclusion that Section 3109 does not contain an exception for officer safety is strengthened, because at the time of the framing, the common law provided no such exception. With respect to English common law, there are "no indications" that it "ever evolved an exception to the knock and announce rule based upon a reasonable apprehension of peril by the peace officer." Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule--Part I*, 16 Search And Seizure Law Report (July 1989) at 132.

With respect to America, there are "no reported cases in America before 1791 discussing *any* exigent circumstances exception to announcement." Driscoll, *Unannounced Police Entries and Destruction of Evidence after Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs.1 (Fall, 1995) at 26 (emphasis added). The first time a danger-to-the-officer exception was recognized in America was in 1822 in *Read v. Case*, 4 Conn. 166, 170 (1822). There the court held that a plaintiff who "had resolved...to resist even to the shedding of blood...was not within the reason and spirit of the rule requiring notice." *Id.*

At the time of the framing, therefore, about 40 years before *Read* was decided, the common law did not recognize an apprehension-of-danger exception to the knock-and-announce requirement. Therefore, Section 3109 contains no such exception, and the Court below reached the correct result.

E. Certiorari Should Be Denied Because The Court Below Decided the Case Correctly.

In *Miller*, the Court explained that "[f]rom earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Id.* at 313 (emphasis added). The Court explained further:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house....Because the petitioner did not receive...notice before the officers broke the door to invade his home, the arrest was unlawful and evidence seized should have been suppressed.

Miller, 357 U.S. at 313-14.

In light of the principle that animates *Miller*, the government's insistence that property damage must play no part in the determination of whether the officers acted in an objectively reasonable manner in deciding to make a forced entry into a residence in the early morning is wrong.[10] It constitutes not only a crabbed view of the knock-and-announce principle enacted by Congress, but also a "grudging application" of the statute of the kind forbidden by *Miller* and *Sabbath*. Prevention of damage to property is a fundamental interest served by the knock-and-announce principle. Thus, the government's argument that property damage is irrelevant to the question whether the government has complied with Section 3109 makes no sense.

The law is concerned with prevention of property damage not merely for the sake of the property itself, but also because of the fear that a homeowner, upon hearing the shattering of a window or the breaking down of a door, will mistakenly believe his residence is being invaded by criminals and will take action to defend himself and his family. *See Miller*, 357 U.S. at 313-14 n.12 (compliance with Section 3109 "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."). This is precisely what occurred in the case at bar. Indeed, as recognized in *Miller*, one of the principal objectives of the

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[10]The government makes an alternative argument that property damage should at most be considered a single factor in the reasonableness inquiry, but should not act as a "switch" that elevates the level of evidence of dangerousness required to dispense with a prior announcement. (Pet. 17 n.7).

common law's knock-and-announce requirement was to protect *the arresting officers* from being shot as trespassers,

> ...for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

Launock v. Brown, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819); *see Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng.Rep. 123, 126-27 (K.B. 1802) ("such conduct must...provoke [] resistance").

The same rationale obtains today. As stated by one commentator,

> an unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home.

2 Wayne R. LaFave, *Search and Seizure* (2d ed. 1987) § 4.8(a) at 272 (quoting *State v. Carufel*, 112 R.I. 664, 314 A.2d 144 (1974)); *see Or. Rev. Stats.* §§ 161.205(5), 161.219(2), 161.225 (homeowner may used deadly force to protect persons and property if reasonably necessary). Thus, contrary to the government's suggestion (Pet. 17-18 n. 7), even a "minor amount" of property damage constitutes a basis for finding an unannounced entry unlawful.

The approach of the Ninth Circuit, as set forth in *Bustamante-Gamez*, *McConney*, and *Becker* is merely a particular application of the very test that the government urges is the law; that is, under the totality of circumstances, did the officers reasonably believe that entry without notice was necessary to prevent harm to the officers or other persons, to prevent the fugitive's escape, or to prevent destruction of evidence. (Pet. 9). As recently restated by the Ninth Circuit:

> Exigent circumstances are those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. In particular, we have held that "mild exigency" is sufficient to justify simultaneous or immediate entry when entry can be accomplished without any physical destruction of property. Mild exigency exists where there is a likelihood that the occupants of the dwelling will try to escape, resist, or destroy evidence. *McConney*, 728 F.2d at 1206.

Hudson, 100 F.3d at 1417 (some citations omitted).

In describing some of "those circumstances" which inform the reasonableness inquiry, the Ninth Circuit quite properly considers the presence or absence of property damage an important factor. Furthermore, it is entirely appropriate for the Court of Appeals to reason that more specific inferences of danger are necessary to justify property damage during an unannounced entry into a family residence at a time when all the occupants are asleep. When a court engages in a balancing test, as the court below did here, not only does nothing preclude the court from determining that if one particular important factor exists, there should be more of another factor, but rather, this balancing of factors is an inherent part of the weighing process. *Cf. Barker v. Wingo*, 407 U.S. 514, 530-31 (1972) (in determining whether right to speedy trial is violated, a lengthy delay acts as "triggering mechanism" requiring consideration of other factors); *Cooper v. Scroggy*, 845 F.2d 1385, 1390-91 (6th Cir. 1988) (in considering whether confession involuntary under totality of circumstances, evidence of physical abuse carries great weight and raises presumption of involuntariness which other factors must overcome).

1. <u>In Determining The "Reasonableness" Of A No-Knock Entry The Courts Look To The Totality Of The Circumstances Surrounding The Entry Including The Interests Of The Occupants In Privacy, Safety, And The Integrity Of Property</u>.

In *Richards v. Wisconsin*, the Court stated that the Fourth Amendment's knock-and-announce requirement is excused if an officer can show a "reasonable suspicion" that danger will ensue if the officers give notice of their presence. The Court said that this showing "is not high," but it nevertheless must be met. 117 S. Ct. at 1422. Even assuming that this minimal constitutional standard applies to this Section 3109 case, the result reached by the Court of Appeals is consistent with that standard.

In *Richards*, the Court did not suggest that in evaluating "reasonableness" the courts must consider only the executing officer's state of mind with respect to his safety. On the contrary, "reasonableness" is measured "in objective terms by examining *the totality* of the circumstances." *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996) (emphasis added). Thus, a proper inquiry necessitates a consideration of "all the circumstances" surrounding the event. *Id.* at 421 (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). The "touchstone of our analysis under the Fourth Amendment is always the reasonableness *in all the circumstances* of the particular governmental invasion of a citizen's personal security," *Maryland v. Wilson*, 117 S. Ct. 882, 884 (1996) (emphasis added).

With respect to no-knock entries under the federal statute in particular, the Court has emphasized that "a claim under 18 U.S.C. § 3109 depends upon *the particular circumstances* surrounding the execution of the warrant." *Jones v. United States*, 362 U.S. 257, 272 (1960) (citing *Miller*, 357 U.S. at 301, emphasis added); *see United States v. Lucht*, 18 F.3d 541, 549

(8th Cir. 1994) (in reviewing the reasonableness of a no-knock entry under the statute, courts must consider "the particular facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant"), *cert. denied*, 513 U.S. 949 (1994).

For example, courts should consider, among other things: (1) whether the home is occupied by an innocent, sleeping family as opposed to a force of vigilant, armed thugs, (2) whether the entry is to be during the day or in the pre-dawn hours of the morning when the occupants will be sleeping, (3) whether or not children are likely present , (4) whether or not the occupants are likely to be frightened and mistakenly believe they are being attacked by criminals, (5) the degree of likelihood that the fugitive sought is actually on the premises, and if he is, whether he is armed and prepared to shoot at the police, (6) whether the officer must enter at all, (7) whether entry can be achieved by means of a ruse, and, most importantly, (8) whether the officer will enter peacefully through an unlocked door or whether he will enter violently, by means of kicking in the door or breaking a window. *Cf. Brown*, 52 F.3d at 421 (listing other factors); *Dorman* 435 F.2d at 392-393 (setting forth similar list of circumstances that should be considered when determining reasonableness of unannounced, warrantless entry). In the case at bar, the Ninth Circuit considered the totality of circumstances mentioned above, and its holding was "necessarily fact-bound." (Pet. 11a).

The government seeks to minimize the individual's interest in his property, arguing that it is less fundamental than the interest in avoidance of unnecessary surprise. (Pet. 10). The government cites no authority for this proposition because the law is to the contrary. As shown above at pages 13-14, preventing damage to property is one of three equally valid purposes

underlying the knock-and-announce principle. Moreover, in *Richards*, this Court rejected a similar argument. There the Court admonished as follows:

> ...[T]he individual interests implicated by an unannounced, forcible entry should not be unduly minimized....[T]he common law recognized that individuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

Richards v. Wisconsin, 117 S. Ct. at 1421 n.5 (citations omitted).

Finally, the government concedes that excessive or "wholly unnecessary" destruction of property by law enforcement officers in the execution of a warrant "may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry." (Pet. 13-14). This concession seriously undermines the government's position because, as observed by the Court of Appeals, Mr. Ramirez's property "was needlessly damaged." (Pet. 8a).

To justify its actions, the government argues that breaking the garage window simultaneously with entry was a reasonable way "to draw the occupants" away from the doors of the residence. (Pet. 17). This makes no sense for two reasons. First, reasonable law enforcement officers would hardly divert a dangerous fugitive to the garage, the *very place where guns were supposed to be*.[11] Second, as found by the Court of Appeals, and as confirmed by the wisdom of 700 years of common law, this kind of gratuitous property damage was bound to

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[11]The government appears to have its signals mixed. In the Court of Appeals, the government argued the exact opposite; there the government suggested that the agents acted wisely because they were *preventing* the occupants from gaining access to the firearms in the garage (Lodged Doc. C at 7, Doc. D at 1-2). The government's contradictory arguments highlight the sheer speculation in which the government engages to justify the officers' unreasonable actions here.

provoke a violent reaction by a homeowner who would act to defend his family and his property. (Pet. 7a-8a).

2. **Failure To Comply With The Knock-And-Announce Principle Magnifies--Rather Than Reduces--The Officers' Danger.**

The government argues that the Ninth Circuit's approach has dangerous consequences and "threatens to jeopardize the safety" of officers executing warrants. (Pet. 10). For the reasons set forth in Part D2, it is clear that the opposite is true. The very real dangers of no-knock forced entries are apparent from Congress' disastrous experiment with, and speedy repeal of, the no-knock law, the experience of 700 years of common law, and the continuing tragedies recorded in contemporary newspaper accounts. Failure to comply with the strict requirements of the knock-and-announce principle has caused, and continues to cause, many more death to both officers and civilians than the reverse.

3. **The Court Below Properly Requires More Specific Information About A Suspect's Dangerousness Before Permitting Officers To Break Into A Family Residence And Terrorize Its Sleeping Occupants By Smashing A Window.**

The government argues that the Ninth Circuit's methodology is wrong because it is unreasonable to demand specific information as to dangerousness because "such specific inferences are ordinarily unavailable to officers." (Pet. 14). This argument is wrong for two reasons.

First, the "central teaching of this Court's Fourth Amendment jurisprudence...is a demand for specificity in the information upon which police action is predicated." *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968). In justifying the particular intrusion, the police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those

facts, reasonably warrant the intrusion." *Id.* at 21; *see Maryland v. Buie*, 494 U.S. 325, 334, 336-37 (1990) (specific and articulable facts must be shown to authorize the police to look for others present in a home); *People v. Gastelo*, 67 Cal.2d 586, 588-89, 432 P.2d 706, 708 (1967) (specific showing must always be made to justify forcible entry). Requiring specific inferences of danger is particularly appropriate here where officers terrorize a sleeping family by breaking a window in pre-dawn hours, causing the homeowner to believe that his home is being invaded and to take wholly predictable actions to defend himself, his wife, and his child.

Second, the long history of government success under the approach that it now attacks belies the assertion that specific inferences of danger are ordinarily unavailable to the officers. The Ninth Circuit's cases are rife with instances of the availability of such inferences to the police.[12]

CONCLUSION

Ironically, the danger to the officers in the instant case arose not from Shelby, who was not on the premises, but rather from the officers' unreasonable failure to comply with the simple and ancient requirement that the officers "ought to signify the cause of their coming, and to make

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[12]*See e.g., United States v. Hudson*, 100 F.3d 1409, 1417 (1996) (defendant recently sold drugs to informant, had prior conviction for drugs and observed with guns and drugs in bedroom); *United States v. Scott*, 74 F.3d 175, 176 (9th Cir. 1996) (defendant observed with weapon in his hand); *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995) (defendant "had shot and killed a suspected informant" and said he would "go down shooting"); *United States v. Von Willie*, 59 F.3d 922, 926 n.3 (9th Cir. 1995) (defendant armed and dangerous); *United States v. Reed*, 15 F.3d 928, 934 (9th Cir. 1994) (officer knew defendant likely armed and might escape and slammed door in officer's face); *United States v. Turner*, 926 F.2d 883 (9th Cir.) (defendant overheard to say that he kept gun for use against police), *cert denied*, 502 U.S. 830 (1991); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir.1985) (police knew from teletype that suspects in a kidnaping and murder investigation were to be considered armed and dangerous); *United States v. McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (defendant armed and previously convicted of shooting at an officer); *Gilbert v. United States*, 366 F.2d 923, 931 (9th Cir. 1966) (armed and alleged to have killed police officer).

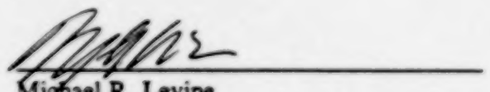
request to open doors" before destroying property and causing terror to a sleeping household. In the words of the court below, "[h]ad Ramirez been less reasonable [by firing at the intruder at the window instead of at the ceiling], the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed." (Pet. 8a). Senator Sam Ervin could have had this case in mind when he said:

> When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer...or...a burglar. He is going to resist to the utmost, even to the taking of lives....It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true.

See page 21, *supra*.

Because the Ninth Circuit reached the proper result, and for all the other reasons set forth above, the Court should deny the government's request for certiorari.

RESPECTFULLY SUBMITTED this 16th day of May, 1997.



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No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE AND MAILING

I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the petitioner by depositing in the

United States Post Office, in Portland, Oregon on May 16, 1997, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Walter Dellinger
Acting Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on May 16, 1997, with first-class postage prepaid.

DATED this 16th day of May, 1997.

Michael R. Levine
Attorney for Respondent